Supreme Court, U.S.
FILED
071130 FEB 8 - 2008
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

FRANCIS EDWIN FROELICH,
Petitioner,

v.

THE LEWIS LAW FIRM, PC
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR WRIT OF CERTIORARI

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February 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Under the Virginia Attorney's Lien Statute, Va. Code Ann. § 54.1-3932, as interpreted and applied by the Virginia courts, a lawyer may collect attorneys' fees that are disputed by the client by filing a lien on the client's property and then obtaining a court order to foreclose the lien. The lawyer is not required to make any evidentiary showing and the client is not allowed to offer any evidence to challenge the claim to attorneys' fees before or after the client's property is taken. The question presented is:

> Whether the Virginia Attorney's Lien Statute, Va. Code Ann. § 54.1-3932, as applied, satisfies the procedural requirements of the Due Process Clause of the Fourteenth Amendment when it authorizes the taking of property to satisfy a claim without any process to test the validity of the claim?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

Francis Edwin Froelich, Sara Louise Froelich and The Lewis Law Firm, PC.

Because Petitioner is not a corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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FRANCIS EDWIN FROELICH,

Petitioner,

v.

THE LEWIS LAW FIRM, P.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Francis Edwin Froelich, a prolific litigant who is both an attorney and a physician, invokes this Court's jurisdiction to challenge the adequacy of the due process afforded to him by the Circuit Court of Fairfax County, Virginia, in a dispute over the legal fees owed by him to his former attorneys in a hotly-contested divorce proceeding.

Froelich has previously litigated this matter in the Circuit Court (which held four hearings on the matter), the Court of Appeals of Virginia, the Supreme Court of Virginia, the Virginia Fee Arbitration Committee, the District of Columbia Attorney/Client Arbitration Board, and the United States District Court for the Eastern District of Virginia (in which one of his two collateral attacks remains pending). Froelich now reprises his federal due process arguments in this Court. The questions presented in Froelich's petition for certiorari are:

1. Whether this Court should grant certiorari to review state-court proceedings about which the petition addresses no misstatement of law below and thus identifies no conflict with any other court.

2. Whether this Court should grant certiorari to address Froelich's allegations of errors when Froelich has failed to preserve any issues on appeal by filing a transcript or statement of facts as required by Virginia law.

3. Whether this Court should grant certiorari to determine whether the extent of the hearing and briefing afforded to Froelich by the Circuit Court violated Froelich's due process rights under the United States Constitution.

RULE 29.6 STATEMENT

Respondent is a professional corporation. No parent or publicly held corporation owns 10 percent or more of Respondent's stock.

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INTRODUCTION

The petition in this case is the latest effort by Francis Edwin Froelich to avoid fees and costs owed by him to his former attorneys at The Lewis Law Firm (the "Firm"). Froelich presents strained constitutional challenges to the due process afforded to him in connection with a series of hearings and briefings on this fee dispute in the Circuit Court of Fairfax County, Virginia.

Throughout this litigation, Froelich has taken extraordinary measures to avoid his debt, litigating extensively before the Circuit Court (which held four hearings on the matter), the Court of Appeals of Virginia, the Supreme Court of Virginia, the Virginia Fee Arbitration Committee, the District of Columbia Attorney/Client Arbitration Board, and the United States District Court for the Eastern District of Virginia. Froelich now reprises his federal constitutional challenges in this Court.

Froelich's petition should be denied for two threshold reasons. First, Froelich's petition focuses on factual and evidentiary questions below and does not raise certworthy issues. Second, as previously suggested by the Court of Appeals of Virginia, Opp. App. 2a,[1] Froelich has not preserved any issues on appeal by virtue of his failure to file a transcript or statement of facts as required by Virginia law.

Even if this Court were inclined to delve into factual minutiae and consider matters not properly preserved below, Froelich's constitutional challenge does not stand on its merits. Froelich incredibly

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[1] "Pet. App." refers to the appendices that follow Froelich's petition. "Opp. App." refers to the appendices that follow this brief in opposition.

argues that he was not afforded due process in a proceeding in which he was allowed no fewer than eight opportunities to present briefing, argument, and evidence. Therefore, the petition should likewise be denied on its merits.

COUNTERSTATEMENT

On August 12, 2004, Froelich executed a retainer agreement with the Firm in which he agreed to pay the Firm for legal services, costs, and expenses in connection with his dissolution of marriage action before the Circuit Court of Fairfax County, Virginia. Froelich then advanced $100,000 to the Firm under that agreement to cover future legal fees and costs.

For the following year, the Firm provided ongoing representation and counsel to Froelich with respect to various aspects of his hotly-contested divorce proceeding, tax liabilities, and other matters. Record 14-353.[2] Froelich, who is himself a practicing attorney and a licensed physician, was actively involved in these matters and enthusiastically directed this multi-faceted engagement with full knowledge of its mounting costs, which had been detailed in regular billing statements sent by the Firm to Froelich. Record 630-723, ex. B.

After the funds previously advanced by Froelich were exhausted, the Firm repeatedly requested that Froelich begin to pay his legal bills, which increased each month. Froelich, who was still actively involved in directing his complex case and with full knowledge of the fees and costs being incurred, explained that he intended to pay the Firm's bills in full but, due to

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[2] "Record" refers to the record of proceedings in the Circuit Court of Fairfax County, Virginia, as compiled and submitted to the Supreme Court of Virginia.

"temporary illiquidity," could not do so until his divorce became final. Accepting that explanation, and as an accommodation to Froelich, the Firm delayed taking further action on this debt upon receiving a promissory note with confession of judgment from Froelich for $82,604.93, dated August 5, 2006.

In the following months, the Firm continued to represent Froelich, and Froelich continued to demand intensive advice, counsel, strategy, drafting, and other assistance on numerous matters. As Froelich's debt to the Firm increased, Froelich stopped responding to repeated inquiries from the Firm regarding payment of his debt. Finally, the Firm filed its motion for leave to withdraw as counsel on September 30, 2005. Record 350-53. To secure its interest in the proceeds of Froelich's divorce settlement, the Firm filed a notice of charging lien in the amount of $137,690.06 on November 7, 2005. Pet. App. 12a.

Having completed the bulk of the legal work in connection with Froelich's divorce, the Firm received leave of court to withdraw as Froelich's counsel on December 8, 2005. Record 383-84. Froelich and his ex-wife were divorced on December 14, 2005. Record 400-24.

On December 22, 2005, Paul R. Smollar, Esquire, counsel for Froelich's ex-wife, filed a "Motion for Declaratory Judgment and/or Guidance" asking for the Circuit Court's direction regarding stock worth approximately $73,544.00 that his client owed to Froelich pursuant to the terms of the marital settlement agreement. Record 425-29. The Firm filed its response to that motion on January 5, 2006,

asserting its claim to that stock in partial satisfaction of its lien. Record 430-31. Froelich did not file any paper in opposition to that motion before the hearing in the Circuit Court on January 6, 2006.

On January 6, 2006, the Circuit Court heard oral argument from Froelich and the Firm on Mr. Smollar's motion and the Firm's claim. When Froelich demanded additional opportunity to state his defenses, the Court permitted additional hearing and briefing from Froelich and from the Firm regarding the lien and the outstanding debt.

On January 20, 2006, Froelich filed his memorandum opposing the Firm's lien. Record 432-59. In a shotgun approach, Froelich asserted arguments regarding Fourteenth Amendment due process and claims for civil rights violations under 42 U.S.C. § 1983. The memorandum also set out Froelich's equally flawed arguments on the substance of the fee dispute: (1) that the Firm's fees exceeded those charged by his ex-wife's attorneys and (2) that the fees were excessive when compared to his share of the marital estate. Record 433. Despite having ample notice and opportunity to do so, Froelich did not challenge any of the billing statements he had received from the Firm or any of the line items therein, which detail the extensive work that the Firm performed on his behalf and at his explicit direction. Record 630-723, ex. B.

The Firm filed its responsive memorandum in support of its lien on January 27, 2006. Record 460-561. This response also addressed the merits of the fee dispute. It explained that Froelich's high legal expenses resulted from his own conduct with respect to the litigation. It established that these expenses

were expressly authorized and ratified by Froelich through his retainer agreement, the fee advance, the promissory note, and his rejection of advice from counsel that any possible benefit from his aggressive litigation strategies would not likely exceed the high cost of implementing them. It also described the Firm's detailed billing practices and noted that Froelich has never identified any error on those bills or questioned those charges.

On February 3, 2006, the Circuit Court ruled on the validity of the Firm's lien, denied Froelich's claims (as reflected in the transcript not properly filed by Froelich to preserve any issues on appeal), and entered an Order "grant[ing] The Lewis Law Firm, P.C. leave of court to file a petition to enforce its attorney's lien against the Defendant." Pet. App. 3a. Pursuant to that order, Mr. Smollar created two escrow accounts to hold the marital property claimed by the Firm in satisfaction of the debt.

Although Froelich did not present any arbitration demand to the Circuit Court at the February 3 hearing, he attempted on several occasions to initiate arbitration proceedings in improper forums. On February 2, 2006, Froelich submitted an arbitration demand and consent to arbitrate a fee dispute with the Firm before the Virginia Fee Arbitration Committee. Four days later, on February 6, 2006, Froelich withdrew this arbitration demand. Also on February 6, Froelich submitted an Agreement to Arbitrate to the District of Columbia Attorney/Client Arbitration Board (the "ACAB").

On January 19, 2007, the Firm requested that the Circuit Court permit it to execute on its judgment against Froelich and bar him from further efforts to

arbitrate a dispute that was already properly before that court. Record 565-87. That matter was set for hearing in the Circuit Court on February 2, 2007. Less than one week before that scheduled hearing, Froelich filed an emergency motion in the United States District Court for the Eastern District of Virginia seeking to stop the Circuit Court hearing. On the day before the Circuit Court hearing, the District Court, *sua sponte*, found that the matter was properly before the Circuit Court and dismissed Froelich's federal lawsuit. Pet. App. 24a.

Upon hearing further arguments from Froelich and the Firm on February 2, 2007, the Circuit Court permitted the Firm to collect its debt and ordered that Froelich drop any further arbitration demands. Pet. App. 5a.[3] Accordingly, on February 12, 2007, the ACAB dismissed Froelich's arbitration demand. Pet. App. 21a.

On February 22, 2007, Froelich filed a Notice of Appeal to the Court of Appeals of Virginia from the Circuit Court's February 2, 2007, Order. Record 589-91. Although Froelich's Notice of Appeal specifically indicated that he would file a transcript and statement of facts, Record 589-91, he did not do so at that time or at any time before April 3, 2007, which marked the end of the 60-day period for filing such documents under Rules 5:11 and 5A:8 of the Supreme Court of Virginia. Accordingly, on May 14,

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[3] Froelich's petition repeatedly suggests that he requested but was denied hearings on his objections in the Circuit Court proceedings. *E.g.* Pet. 8, 11, 21-23. In fact, Froelich was given extraordinary latitude at numerous hearings to present arguments and evidence, and the Firm specifically objects to any contrary assertion by Froelich pursuant to Supreme Court Rule 15.2.

2007, the Court of Appeals, *sua sponte*, entered an order requiring Froelich to show cause why this failure to comply with the Rules did not amount to a failure to preserve any issues on appeal. Opp. App. 2a.

On May 29, 2007, Froelich filed a "Memorandum to Show Cause" and "Motion for Lieve [sic] to Strike Submission and Substitute" in response to the Court of Appeals' order. On May 30, 2007, before the Firm had an opportunity to respond, the Court of Appeals transferred Froelich's appeal to the Supreme Court of Virginia without considering Froelich's response to the order to show cause. Opp. App. 1a.

On November 13, 2007, the Supreme Court of Virginia held that there is no reversible error in the judgment complained of by Froelich. Pet. App. 1a.[4]

REASONS FOR DENYING THE WRIT

Froelich's petition belies his assertion that this case presents important federal questions warranting this Court's attention. Indeed, Froelich's argument

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[4] In response to the Supreme Court of Virginia's ruling, Froelich has unleashed a flurry of new litigation challenging the Firm's judgment. In addition to filing his petition in this Court, Froelich also filed yet another collateral challenge in the United States District Court for the Eastern District of Virginia, seeking in a six-count complaint to overturn the judgment below on the basis of alleged violations of his constitutional rights, 42 U.S.C. § 1983, and RICO, 18 U.S.C. §§ 1961 *et seq.* First Amended Complaint, *Froelich v. The Lewis Law Firm, P.C.*, No. 07-cv-01230-CMH-BRP (Feb. 1, 2008). Disregarding the Supreme Court of Virginia's disposition of this matter, Froelich also boldly returned to the Circuit Court on December 19, 2007, with a motion to "clarif[y]" or "reconsider and modify" the judgment that had just been upheld on appeal in Virginia's highest court.

focuses entirely on the (disputed) factual sufficiency of the hearings held below and identifies no novel or unsettled issues of law. But this Court sits to settle important questions of federal law, not as an additional appellate option for disappointed state-court litigants.

The writ should also be denied on the basis that the issues presented were not properly preserved in the courts of Virginia and that the "record" of hearings below (which was not properly preserved) discloses that Froelich was afforded due process that far exceeds federal constitutional minimums.

I. FROELICH'S PETITION DOES NOT RAISE CERTWORTHY ISSUES.

Froelich's petition focuses exclusively on the details of the numerous hearings held in the Circuit Court of Fairfax County, Virginia, and whether those hearings, taken together, afforded him the level of constitutional due process required by the Fourteenth Amendment. The petition does not suggest that any Virginia court improperly stated any rule of law or that any principle of law articulated by any Virginia court is in conflict with any statement of law by any other court. Simply put, Froelich's disagreement with the Virginia courts is over whether the numerous opportunities for hearing and briefing afforded to him met the minimum level of due process required by the federal constitution.

Even if valid, such a narrow disagreement over the factual sufficiency of a litigant's opportunity to be heard does not warrant review by this Court. S. Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of

law"); *cf. United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts").

II. FROELICH HAS FAILED TO PRESERVE ANY ISSUES ON APPEAL.

Froelich's failure timely (or ever) to file a transcript or statement of facts of the proceedings in the Circuit Court acts to bar both federal and state appellate review of any issues with respect to the sufficiency of the hearings whose record was not properly preserved. Froelich noticed his appeal from the Circuit Court's February 2, 2007, order on February 22, 2007. However, as suggested by the Court of Appeals of Virginia, Opp. App. 2a, he failed to file a transcript or statement of facts as required by Rules 5:11 and 5A:8 of the Supreme Court of Virginia. "The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment." Va. S. Ct. Rules 5:11, 5A:8. "The times prescribed for filing * * * the transcript or written statement (Rule 5:11) * * * are mandatory." Va. S. Ct. Rule 5:5(a).

This Court has long held that it will consider only those federal questions that have been properly preserved and specifically presented at each stage of the state-court litigation below. *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341, 343-44 (1920). Likewise, the Supreme Court of Virginia has held that "the judgment of the lower court is presumed to be correct and the burden is on the appellant to present to us a sufficient record from which we can determine whether the lower court has erred in the respect complained of." *Justis v. Young*,

119 S.E.2d 255, 256-57 (Va. 1961). Failure to provide a record sufficient for appellate review is a defect that requires dismissal of the appeal or affirmation of the lower court's judgment. *See id.; Commonwealth v. Williams*, 553 S.E.2d 760, 764 (Va. 2001) (without a transcript from the lower court hearing, "we are unable to determine whether the circuit court conducted an adequate inquiry"). *See also Jenkins v. Dir. of Va. Ctr. for Behavioral Rehab.*, 624 S.E.2d 453, 455 (Va. 2006) (dismissal for failure timely to file transcripts); *McDonald v. National Enters., Inc.*, 547 S.E.2d 204, 211 (Va. 2001) (same); *White v. Morano*, 452 S.E.2d 856, 858 (Va. 1995) ("If an insufficient record is furnished, the judgment appealed from will be affirmed."). Under Virginia Supreme Court Rule 5:11, dismissal is an appropriate remedy where the appellant has failed to preserve any issues on appeal by not timely filing a transcript or statement of facts. *See In re Moseley*, 643 S.E.2d 190, 192 n.1 (Va. 2007) ("Court dismissed the petition for appeal under Rule 5:11 for failure to timely file a transcript or written statement of facts.").

Moreover, the absence of a transcript or statement of facts is fatal to Froelich's ability to argue that any ruling in the Circuit Court was met with a specific, contemporaneous objection. *See* Va. S. Ct. Rule 5:25 ("Error will not be sustained to any ruling of the trial court * * * unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."); *Nusbaum v. Berlin*, 641 S.E.2d 494, 503 (Va. 2007) (requiring record of specific, contemporaneous objection to preserve issue on appeal). *See also McDonald v. Commonwealth*, 645

S.E.2d 918, 921 (Va. 2007) (Court will not consider issues not preserved for appeal before trial court); *Alexandria City Council v. Mirant Potomac River, LLC*, 643 S.E.2d 203, 207 (Va. 2007) (same).

Before this appeal was transferred to the Supreme Court of Virginia, the Court of Appeals of Virginia suggested these fundamental defects in Froelich's appeal. On May 14, 2007, it ordered, *sua sponte*, that Froelich show cause why his failure to comply with the provisions of Virginia Supreme Court Rule 5A:8 analogous to Rule 5:11 would not require the Court of Appeals to dismiss his appeal. Opp. App. 2a. Froelich filed a response to that order, but the Court of Appeals transferred Froelich's appeal to the Supreme Court of Virginia on May 30, 2007, before ruling on the sufficiency of Froelich's response. Opp. App. 1a. The Court of Appeals' transfer prior to ruling on its order to show cause does not save Froelich from his failure to preserve his record on appeal, and this Court should deny the petition for this threshold reason alone.

III. FROELICH'S DUE PROCESS RIGHTS WERE PROTECTED.

Froelich had no fewer than eight opportunities to address the Circuit Court of Fairfax County, Virginia, on the merits of this matter, and he did so on six occasions with extensive briefing and oral argument. Although the transcripts of these hearings are not properly before this Court due to Froelich's failure to file them below, even the "record" that does exist demonstrates that Froelich was afforded more than ample opportunity to make arguments and present evidence in his defense. Accordingly, Froelich's due process challenges under

the Fourteenth Amendment to the United States Constitution are without merit and should be rejected.

The Circuit Court was exceedingly solicitous in its attention to Froelich's defenses, giving him at least eight opportunities to address the merits of the fee dispute: (1) briefing in opposition to his ex-wife's motion filed December 22, 2005 (Record 425-29); (2) oral argument on January 6, 2006; (3) supplemental briefing on January 20, 2006 (Record 432-59); (4) oral argument on February 3, 2006; (5) briefing in opposition to the Firm's petition filed January 19, 2007 (Record 566-87); (6) oral argument on February 2, 2007; (7) briefing in opposition to the Firm's petition to release funds pending appeal filed April 3, 2007 (Record 617-26); and (8) oral argument on April 10, 2007. Froelich addressed the court on six of these occasions (2, 3, 4, 6, 7, and 8), including the oral argument by his retained attorney, Theodore S. Allison, on April 10, 2007. As explained above, the transcripts of these hearings (2, 4, 6, and 8) are not properly before this Court on appeal. If they were, however, they would even more effectively debunk Froelich's due process arguments by showing that he was afforded well more than the minimum opportunity required by the Constitution to present arguments and evidence in his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 2008

APPENDIX

APPENDIX A

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday *the* 30th *day of* May, 2007.

Record No. 0496-07-4

Circuit Court No. CL-07-879

Francis Edwin Froelich, Appellant,

against

The Lewis Law Firm, Appellee.

From the Circuit Court of Fairfax County

It appears that this Court does not have jurisdiction over this case. Accordingly, the case hereby is transferred to the Supreme Court of Virginia pursuant to Code § 8.01-677.1.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ [Illegible]

Deputy Clerk

APPENDIX B

VIRGINIA:

In the Court of Appeals of Virginia on Monday *the* 14th *day of* May, 2007.

Record No. 0496-07-4

Circuit Court No. CL-07-879

Francis Edwin Froelich, Appellant,

against

The Lewis Law Firm, Appellee.

From the Circuit Court of Fairfax County

On preliminary examination, the Court concludes that neither a transcript nor statement of facts was timely filed in this case, *see* Rule 5A:8, and that no extension of time in which to file a transcript or statement of facts is now possible, *Jordan v. Price*, 3 Va. App. 672, 353 S.E.2d 168 (1987). While the absence of the transcript or statement of facts does not always deprive this Court of jurisdiction, the Court will consider only those issues which may be decided without reference to a transcript or statement of facts. When a transcript is indispensable to the determination of an issue, the absence thereof in the record is a jurisdictional defect and requires dismissal of the claim. *See Goodpasture v. Goodpasture*, 7 Va. App. 55, 57, 371 S.E.2d 845, 846 (1988) (family law case saved from dismissal by judge's letter opinion, other documents). *E.g.*, *Anderson v. Commonwealth*, 13 Va. App. 506, 413 S.E.2d 75 (1992) (statement of facts in criminal case); *Turner v. Commonwealth*, 2 Va. App. 96, 341 S.E.2d 400 (1986) (transcript in criminal case); *Barrett v.*

Barrett. 1 Va. App. 378, 380, 339 S.E.2d 208, 210 (1986) (neither filed).

Accordingly, it is ordered that appellant shall show cause, by a reply to this order on or before May 29, 2007, why this appeal should not be dismissed. In any response to this order, appellant shall state clearly any questions properly presented by this appeal, *see* Rules 5A:12(c) and 5A:20(c), and preserved for appellate review, *see* Rule 5A:18, which can be considered without resort to the transcript or statement of facts. Appellant shall further explain why the questions can be decided without reference to the transcript or statement of facts.

The period for filing pleadings shall not be enlarged by this order.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Rosellis J. Graham

Deputy Clerk

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(3)

No. 07-1130

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APR 17 2008
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REPLY TO OPPOSITION

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April 17, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY TO OPPOSITION

INTRODUCTION

The Petitioner will briefly address new points raised by the Respondent in the Brief in Opposition, No. 07-1130 (April 4, 2008) (Opposition) and highlight those parts of the Opposition that further support the Petition for Writ of Certiorari, No. 07-1130 (February 8, 2008) (Petition). Petitioner will first discuss some general deficiencies in the Respondent's argument, and then address specific issues raised in the Opposition in the order in which they appear.

GENERAL POINTS CONCERNING OPPOSITION

At the core of the Petition is the objection that Petitioner was ordered to forfeit more than $250,000 without any admissible evidence ever being considered. Recognizing this central issue, the Opposition fails to identify a trial or any other evidentiary hearing, because none was held. The Opposition also does not cite a single piece of admissible evidence on which Respondent's award of attorneys' fees could have been based, because no such evidence was ever introduced.[1]

The Opposition does not refute the central facts upon which the Petition relies: (1) that no evidence in support of Respondent's charges was adduced at any stage; (2) that Petitioner was afforded no opportunity to join issue, conduct discovery, or challenge such evidence as Respondent might have introduced; (3) that Petitioner was barred from pursuing any challenge to Respondent's charges, including Petitioner's attempts to initiate arbitration; and (4) that the matter was decided on a "petition" two weeks after it was filed, which Petitioner was never given an opportunity to answer.[2]

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[1] The reference in the Opposition to "billing statements," with a citation to the Fairfax Court record at pages "630-723," refers to a document filed by Respondent two months *after* entry of the order from which Petitioner appealed. Opposition at 4. The "responsive memorandum" adverted to by Respondent was a bare legal argument that neither authenticated nor offered into evidence any document or fact. *Id.*

[2] The "petition" filed by Respondent on January 19, 2007, was the first document that arguably provided notice of the specifics of Respondent's claims, in the nature of a complaint. Virginia law contains no procedure for responding to such a petition.

The Opposition also fails to cite any decision of a federal court at any level that would support the position that the procedures followed by the Virginia courts comported with due process. Respondent's failure to challenge Petitioner's substantial authority speaks volumes. Nowhere does Respondent meet the argument, or distinguish the numerous controlling decisions of this Court cited in support of the Petition. See Petition v-vi.

By conceding the operative facts and failing to cite any contrary authority, the Opposition effectively concedes that Petitioner was denied a "meaningful opportunity to be heard at a meaningful time" as required by the due process clause.

SPECIFIC NEW POINTS RAISED IN OPPOSITION

The Petitioner responds to the specific new points raised in the Opposition, in the order in which they appear.

I. Opposition Questions Presented

The questions proposed by Respondent bear little resemblance to the straightforward due process question presented in the Petition—i.e., may Virginia grant Respondent a judgment for $250,000 in legal fees without providing any process to test the validity of the claim?

II. Counterstatement

Respondent repeats the allegations, made repeatedly before the Virginia courts, that this is a simple collection case, and that the mere assertion that it was entitled to collect fees, without presenting admissible evidence, was sufficient for it to prevail. Opposition 2-7. This is not the dispute presented in

the Petition, or in the courts below, where Petitioner "denied that Respondent was entitled to the full amount of fees claimed," and "proffered that if given the opportunity to present evidence, he would prove that Respondent acted fraudulently and unethically, in contravention of its retainer agreement, and in violation of other provisions of law," and that "a substantial amount of Respondent's charges would not be recoverable."[3]

The Court need not determine which view of the facts is correct. The question presented by the Petition recognizes that there is a dispute over the merits of Respondent's claim, but questions the means employed by the Fairfax County Circuit Court (Fairfax Court) to resolve that dispute in Respondent's favor through a highly streamlined application of Virginia's Attorney's lien statute, Va. Code Ann. §54.1-3932. The Fairfax Court applied the lien statute to give the liens, which had been imposed without a prior hearing, the effect of a judgment.

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[3] Petition 8. Petitioner was prepared to develop and present evidence that Respondent inflated and falsified bills, committed fraud, breached fiduciary duties, and violated ethical obligations. Petitioner was aware of other former clients of Respondent who had similar contentions and were willing to come forward with evidence. Petitioner was prepared to offer the opinions of one or more experts that Respondent's billings were markedly out of line with the work performed, the documents generated, and the results achieved. Discovery would have disclosed Respondent's contemporaneous financial difficulties, culminating on December 27, 2006 with the filing by a major bank of a lawsuit against Respondent for defaulting on its primary line of credit; at or near the same time, it has been reported in the press, Respondent had failed to make payroll for its employees. Petitioner was denied any opportunity for discovery or to present any of this evidence.

This failure of the Virginia courts to require or even allow evidence on Respondent's claim is the foundation for the question presented to the Court in the Petition: Whether a state can authorize "the taking of property to satisfy a claim without any process to test the validity of the claim?"

III. The Issues Raised by the Petition are Certworthy.

Contrary to Respondent's argument (Opposition p. 8) the Petition presents a clear violation of due process by the Fairfax Court, and explicit affirmance of that decision by the Virginia Supreme Court.

Respondent appears, throughout the Opposition, to urge the adoption of a peculiar policy: that the judgments of state courts should be free from Constitutional scrutiny so long as the courts are silent about the reasons for their actions. The failure of a state court to explain its ruling cannot be held to insulate the ruling from review; the rulings of the Virginia courts are reviewable whether explained or not.

Petitioner cited numerous decisions of this Court in his attempt to challenge the procedures below. These cases were neither distinguished nor discussed by Respondent or the Virginia courts. The Virginia courts either rejected the due process objections out-of-hand, and without explanation, or found "no reversible error."

Respondent's reliance on *United States v. Johnston*, 268 U.S. 200, 227 (1925) is misplaced. Petitioner did not ask for review because there were "erroneous factual findings." Petitioner seeks review precisely because no evidence was received, and Respondent's implicit argument to the contrary is duplicitous. The

entry of a judgment based on mere allegations, not evidence, raises important federal Constitutional issues that have been taken up by the Court in a variety of contexts. Petition 23-24. This case presents the unique issue whether, and under what circumstances, a state may invest the bar with procedural advantages in the collection of fees that would not be available to any other creditor under the due process clause.

IV. The Issues were Preserved for Appeal.

The due process issues were preserved for appeal under state law, and Respondent's procedural argument that they were not is unfounded. The Petition was from the final order of highest court of Virginia, which did not rule based on the point of Virginia appellate procedure raised by Respondent,[4] but held that it was "of the opinion" that there was "no reversible error." The Virginia Court of Appeals did not decide that transcripts were necessary to determination of the appeal before transferring the matter to the Virginia Supreme Court, and indeed

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[4] Respondent's argument is incorrect under Virginia law for several reasons. Petitioner will not address these inaccuracies in detail, as the Virginia Supreme Court did not address them, instead holding that there was no error upon "review of the record." App. A, at 1a. In brief, Respondent well knows that there was never an evidentiary hearing to which transcripts might be relevant. Issues such as Petitioner's objection to the lack of an evidentiary hearing (Memorandum filed January 20, 2007, at 1-3, Record at 432-34), and assertion of that the dispute was subject to an arbitration agreement (*id.* at 5, Record at 436), which appeared on the face of the record, may be resolved on appeal without a transcript. *See Hanover County v. Bertozzi*, 256 Va. 350, 504 S.E.2d 618 (1998) (judgment reversed because record reflected no evidence had been admitted, although no transcript was filed).

noted that the court could and would "consider issues which may be decided without reference to a transcript." (Opposition, App. B, at 2a.)

Petitioner's written objections to the procedure employed by the Fairfax Court at every stage in the proceedings are documented in the record before the Supreme Court of Virginia and this Court. The record also contains the Fairfax Court's order of February 2, 2007, the central ruling which was affirmed on appeal below, reciting erroneously that a judgment had previously been entered;[5] ordering that Petitioner's assets were to be paid over to Respondent pursuant to the nonexistent judgment; and most notably, ordering Petitioner to cease and desist from any other litigation, including arbitration. There is no colorable argument that the due process issue was not preserved for consideration by this Court.

V. Petitioner was denied Due Process of Law.

Respondent argues that Petitioner was not denied due process because the Circuit Court of Fairfax County gave him "eight opportunities to address the merits." Opposition 12. This argument fails for three reasons.

First, Respondent concedes by its silence that no admissible evidence was ever introduced. Therefore, Respondent could not have met its burdens of production or persuasion. As such, there were no merits for Petitioner to address.

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[5] Respondent had filed its "Petition to Release Funds" only 14 days earlier.

Second, the "opportunities" cited in the Opposition occurred months after the first liens were placed on the Petitioner's property without any notice or a hearing. Therefore, none of the "opportunities" constituted prior hearings with respect to the liens, as required by the due process clause. Petition 14-21.

Third, the procedure followed by the Fairfax Court, affirmed on appeal, essentially burdened Petitioner with disproving Respondent's claim for fees, without granting him an opportunity to controvert Respondent's allegations or present evidence of his own. It remains uncontroverted that Respondent effectively obtained a substantial judgment against Petitioner, and executed on that judgment, without an evidentiary hearing, a summary judgment, or the introduction of evidence by any other means.

Each of the specific "opportunities to address the merits" raised in the Opposition is discussed in turn below.

The first opportunity, "briefing in opposition to his ex-wifes' motion filed December 22, 2005," was the opportunity to respond to a written motion filed by Petitioner's ex-wife which sought guidance on the disposition of certain assets in the divorce. There was no complaint or any other type of pleading framing Respondent's claims. There was no trial, and no opportunity to call or cross-examine witnesses, or to present other evidence. No evidence was presented for Petitioner to rebut. Therefore, this was not an opportunity to address the merits of Respondent's claim for fees.

The second opportunity, "oral argument on January 6th, 2006," was a motions hearing that lasted approximately 10 minutes. It was not a trial, no

witnesses were called and no evidence was received. In this proceeding, the Fairfax Court invited briefing on the question of what due process required, resulting in the third "opportunity," a "supplemental brief on January 20, 2006." This briefing was limited by order of the Fairfax Court to a five page discussion of the due process issue as it related to the placing of the liens. The merits of Respondent's claim were not addressed, nor did the court expect them to be.

The fourth "opportunity," an "oral argument on February 3, 2006," consisted of the Fairfax Court announcing its ruling on the due process objection, and inviting Respondent to file a petition to enforce its liens. The Fairfax Court did not allow Petitioner to speak before it announced its ruling and issued its order. See Petition 8. Again, there was no opportunity to address the merits.

The fifth and sixth "opportunities" were the briefing in opposition to Respondent's petition filed January 19, 2007, and the limited oral argument on the petition set by the Respondent on only two weeks' notice. Virginia law contains no procedure for responding to such a petition, nor did the Fairfax Court establish one, and Respondent nowhere suggests that Petitioner was in default in answering the petition. Moreover, at the hearing, no trial was held, no witnesses were called, no affidavits were received—indeed, no evidence was taken in any form. Respondent's "petition" was the first document filed that might arguably have been considered a pleading on the merits; yet, at this hearing, the Fairfax Court ruled that pursuant to a nonexistent judgment (presumably the order entered a year earlier, on February 3, 2006), Petitioner's property was to be turned over to Respondent, and that Petitioner was

to discontinue his efforts to arbitrate the dispute. Assuming for the sake of argument that the January 19, 2007 "petition" was the equivalent of a complaint, Petitioner should have been given the opportunity to answer it, conduct discovery and have issues of fact tried.

At the argument on February 2, 2007, Petitioner informed the Fairfax Court of the pending arbitration, having alerted the court to the existence of an arbitration agreement a year earlier. Petitioner provided the Fairfax Court with a copy of the arbitration panel's ruling that it had jurisdiction over the dispute, and asked that the arbitration be allowed to go forward. Alternatively, Petitioner asked the Fairfax Court for a trial in which he could challenge and rebut Respondent's evidence.

Because the Fairfax Court rejected Petitioner's request for an evidentiary hearing and ordered the arbitration terminated, there was no opportunity to address the merits at this or any stage. The Fairfax Court affirmatively denied Petitioner any opportunity to challenge Respondent's claim on its merits.

The last two "opportunities" cited in the Opposition did not even take place until after the Fairfax Court entered its final order, and were on an entirely different issue, that being security for the state appeal (and Respondent's effort to claim additional fees against Petitioner for "collection"). Having occurred after the final order, by definition these could not have been the prior hearings required by the due process clause.

Thus, nothing in the Respondent's Opposition rebuts or challenges Petitioner's fundamental assertion

that he was ordered by the Fairfax Court to forfeit property without a basic evidentiary hearing, pursuant Va. Code Ann. §54.1-3932, to pay the Respondent $150,000 in alleged attorneys' fees and other charges, and to forego any claim to a refund of the more than $100,000 he had previously paid to Respondent as a deposit. Petition 5-6. Respondent does not controvert the record facts that Petitioner was denied any opportunity to test Respondent's claim or the evidence supporting it, including by means of arbitration of the dispute between them.

CONCLUSION

For the reasons stated in the Petition, the petition for a writ of certiorari should be granted and the case set for plenary briefing and argument on the question presented in the Petition, or in the alternative, the Court should vacate, set aside or reverse the decisions below because the Virginia courts failed to provide due process of law or because the Virginia courts did not have jurisdiction over the dispute in light of the parties' agreement to arbitrate.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FRANCIS EDWIN FROELICH,
Petitioner,

v.

THE LEWIS LAW FIRM, PC,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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MOTION TO REMAND TO THE SUPREME COURT OF VIRGINIA WITH INSTRUCTIONS

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MOTION TO REMAND WITH INSTRUCTIONS

Petitioner hereby moves the Court to grant the Writ of Certiorari summarily and remand to the Supreme Court of Virginia with instructions to reconsider whether the Fairfax County Circuit Court was without jurisdiction over the parties' dispute in light of this Court's intervening decision in *Preston v. Ferrer*, 555 U.S. __, No. 06-1463, (February 20, 2008), interpreting the *Federal Arbitration Act* (FAA), 9 U.S.C. § 1 *et seq.* (2000 ed. and Supp. V).

FACTS

The Petition for a Writ of Certiorari, No. 07-113 (February 8, 2008) (Petition), presents the question of whether Petitioner was denied due process of law when the Circuit Court of Fairfax County, Virginia, enforced an attorney's charging lien against him, in favor of Respondent, without basic procedural safeguards. Among the procedural rights which the Virginia court denied Petitioner was the right to arbitration. Petition at 10. The retainer agreement between the parties, drafted by the Respondent, contained the following mandatory comprehensive arbitration clause:

> 14. Virginia Arbitration Agreement: We agree any controversy between us arising under, out of, in connection with or in relation to our attorney-client relationship and the legal services rendered by us will be submitted for resolution through binding arbitration proceedings. The process will be governed by Virginia Code §8.01-581.01, et. seq. Furthermore, any such arbitration or litigation proceedings shall take place in Fairfax or Arlington County, Virginia, under Virginia law. By agreeing to this clause to arbitrate, you waive certain rights. We suggest that

> you consult with independent legal counsel prior to signing this Agreement and accepting this clause.

Petitioner maintained throughout the state judicial proceedings that the Virginia courts did not have subject-matter jurisdiction over the dispute by virtue of the arbitration clause. Petitioner made application to the Fairfax County Circuit Court to allow the dispute to go to arbitration in the course of a hearing on February 2, 2007. See Petition at 10-11. A year earlier, on February 2, 2006, Petitioner had demanded arbitration before the Virginia Fee Arbitration Committee of the Virginia Bar. Respondent's Brief at 5. Based on Respondent's refusal to arbitrate in that forum, Petitioner filed a demand for arbitration with the District of Columbia Attorney Client Arbitration Board ("ACAB"), which is mandatory for District of Columbia Bar members, such as Respondent.[1]

Respondent's refusal to arbitrate before the Virginia Fee Arbitration Board is neither discussed nor refuted in Respondent's brief. Neither does Respondent explain why it waited to file its petition to enforce the attorney's liens for 11 months after it was granted leave to do so by the Fairfax court, on February 3, 2006. Respondent's Brief, at 5-6. After Petitioner attempted to commence arbitration proceedings for almost a year, culminating in the ACAB asserting jurisdiction over the parties' fee dispute, Respondent returned to the Fairfax County Circuit Court to file a petition to enforce the attorney's liens,

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[1] Under the rules of the District of Columbia Bar, submission to fee arbitration before the ACAB is mandatory for members of the Bar. District of Columbia Bar Rules, Rule XXII; *see Schwartz v. Chow*, 867 A.2d 230, 232 (D.C. 2005).

and Petitioner requested that the court allow arbitration to go forward.

Instead of recognizing its obligation to enforce the arbitration clause, the Fairfax County Circuit Court asserted jurisdiction and ordered that all efforts to seek arbitration be terminated. Petition Appendix at 5a.

Petitioner also attempted to challenge jurisdiction on appeal, presenting the following question to the Virginia Supreme Court for review:

> (1) Did the Circuit Court have jurisdiction to grant attorney's liens under Va. Code Ann. § 54.1-3932 . . . (d) where the attorneys' standard retainer agreement provided that all fee disputes would be arbitrated (Assignment of Error 4)?

Petition for Appeal of Francis Edwin Froelich, Supreme Court of Virginia, Record No. 0496-07-04, Circuit Court No. CL-07-879 (filed July 3, 2007), at 4.

The Supreme Court of Virginia decided not to hear the appeal, finding "no error," even though the Virginia courts exercised subject-matter jurisdiction over the dispute in spite of the mandatory arbitration clause. Petition Appendix at 1a.[2]

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[2] Respondent asserts in its brief, as it did in opposition to Petitioner's Petition for Appeal to the Virginia Supreme Court, that Petitioner's demand for arbitration before the Virginia Fee Arbitration Committee was invalid on the ground (without citation to authority) that Virginia Bar fee arbitration could not be compelled under the Virginia Arbitration Act. Respondent's Brief, at 5 (characterizing the Board, as well as the ACAB, as "improper forums"); *see also*, Brief of the Lewis Law Firm to Supreme Court of Virginia, at 12.

DISCUSSION

The Court should summarily remand this case because the Virginia courts did not have the benefit of the Court's intervening decision in *Preston v. Ferrer*, 555 U.S. ___, No. 06-1463, slip op. (February 20, 2008), when the Virginia courts held that they had jurisdiction to reach the merits of the parties' dispute.

The *Federal Arbitration Act* "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston*, slip. op. at 1, citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). "[Q]uestions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court." *Id.*, citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

The question of whether Virginia law may vest jurisdiction in its courts or another forum, despite the existence of an arbitration agreement among the parties, has now been answered directly by this Court's holding in *Preston* interpreting the *Federal Arbitration Act*:

> We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.

Preston, slip op. at 2. Once the parties agree in a contract to submit their disputes to arbitration, state courts lose subject matter jurisdiction under the FAA. As the Court explained:

> Preston's petition presents precisely and only a question concerning the forum in which the parties' dispute will be heard. . . . Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum.

Preston, slip op. at 12.

The jurisdiction of the arbitral forum is not dependent on a party actually seeking arbitration, but instead occurs once the parties have entered into a plenary arbitration agreement.[3] There was nothing for the Virginia courts to decide in this case, because Respondent's acknowledgement of the arbitration agreement ended the state courts' jurisdiction. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002) (the arbitrator, and not the courts, decides procedural matters as well as the merits of a dispute.)

By asserting jurisdiction over the fee dispute and ordering that all efforts to arbitrate the dispute be terminated, the Virginia courts effectively held that Virginia law vests primary jurisdiction over an attorneys' fee and lien dispute in its courts, even when the parties had previously agreed to arbitrate "any controversy" between them. This application of Virginia law appears to be preempted by the FAA based on the holding in *Preston*.

Subject-matter jurisdiction may be challenged at any time during the original court proceeding, on

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[3] A federal court may consider only issues relating to the making and performance of the agreement to arbitrate. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967).

appeal, or by the Court *sua sponte*. The issue whether the Virginia courts had subject-matter jurisdiction was raised at all stages of the proceedings below. The intervening decision in *Preston* now provides an alternative basis for resolving the Petition for a Writ of Certiorari, summarily, by remanding the case to the Virginia Supreme Court with instructions to reconsider its disposition in light of *Preston*.

Because the Supreme Court of Virginia did not have the benefit of the *Preston* decision when it considered Petitioner's jurisdictional objection, that court should be given the opportunity to reconsider its decision before this Court takes further action. An order remanding this case to the Supreme Court of Virginia with instructions to reconsider the subject-matter jurisdiction of the Virginia courts in light of this Court's recent holding in *Preston* is appropriate.

CONCLUSION

For the reasons stated above, the Court should grant the writ of certiorari and remand to the Supreme Court of Virginia with instructions to reconsider the question whether the Virginia courts had jurisdiction over the dispute in light of the Court's intervening decision in *Preston*.

Respectfully submitted,

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